BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLEN D. BARRINGTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 223,480
GEORGIA PACIFIC CORPORATION	)	
Respondent	)	
Self Insured	)	

ORDER

Claimant requests review of the Award entered by Administrative Law Judge Bryce D. Benedict dated February 1, 2000. The Appeals Board heard oral argument on June 20, 2000.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. The respondent, a self insured, appeared by its attorney, Mark A. Buck of Topeka, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, for the reasons explained below, the Board also considered the August 24, 1998 deposition testimony of Dr. John Rudersdorf and the exhibits introduced at that deposition.

ISSUES

The ALJ found claimant failed to prove that he contracted an occupational disease which arose out of and in the course of employment. Accordingly, benefits were denied. On appeal, claimant seeks review of that finding and alleges that he is entitled to an award based upon a permanent and total disability. In their briefs, claimant and respondent raise the following issues:

(1) Did the ALJ correctly exclude the deposition testimony of Dr. John Rudersdorf?

(2) Was timely notice given?

(3) Was timely written claim made?

(4) Did claimant sustain disablement from an occupational disease compensable under the Kansas Workers Compensation Act?

(5) What was claimant's average weekly wage?

(6) Was there an underpayment of temporary total disability compensation?

(7) What is claimant's entitlement to past and future medical benefits?

(8) What is the nature and extent of claimant's disablement?

Claimant alleges that the ALJ erred by not considering the deposition testimony of Dr. John Rudersdorf. Respondent has filed a motion for that deposition to be stricken from the record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds that the Award of the ALJ should be modified to include the deposition of Dr. John Rudersdorf in the record, but should otherwise be affirmed.

Although claimant listed it in his submission letter, it is clear that the ALJ did not consider the testimony of Dr. Rudersdorf because his deposition had not been filed with the Division when the Award was entered. Thereafter, claimant filed a request that the ALJ reconsider his Award with this additional evidence. Respondent objected contending the deposition of Dr. Rudersdorf was taken for discovery purposes only and was not an evidentiary deposition. Before the ALJ ruled on claimant's request, claimant filed his Petition for Review with the Appeals Board and thereby divested the ALJ of jurisdiction to consider claimant's motion to reconsider.

The Board has held that "a deposition clearly designated as a discovery deposition cannot be included in the record absent a stipulation by the parties."[1] In this case, the Board concludes that Dr. Rudersdorf's deposition was not clearly taken for discovery purposes and should be part of the record. Although respondent's notice reflects that the deposition "is to be used for discovery", the actual transcript of the deposition proceedings contains no such language or indication. In fact, the indications in the transcript are to the

[1] Sherman v. Ninnescah Manor, Inc., WCAB Docket No. 186,998 (March 1998).

contrary. It is significant that during the deposition, respondent's counsel repeatedly "offered" exhibits into evidence. This would not have been necessary in a "discovery" deposition. Such an offer, however, is consistent with an evidentiary deposition. Furthermore, similar notice forms, using the same "discovery" language were used by respondent to give notice of other depositions which were clearly intended to be evidentiary, were filed with the Division, and were considered by the ALJ in making his Award. Those depositions, and Dr. Rudersdorf's, were listed as part of the record by claimant in his submission letter.[2] Claimant's submission letter contained the only recitation of the record for the ALJ as respondent did not file a submission letter. For these reasons the Board concludes that the deposition of Dr. Rudersdorf was not clearly intended as solely a discovery deposition and it should have been considered by the ALJ. Dr. Rudersdorf's deposition testimony has been considered by the Board in this *de novo* review.

Claimant contends he suffers from a work related occupational disease and, therefore, is entitled to receive workers compensation benefits from the respondent. Under the last injurious exposure rule which has been adopted by the Kansas Legislature in occupational disease cases as reflected by K.S.A. 44-5a06, the responsibility for a worker's occupational disease is placed upon the employer who last created the risk of the worker's contraction of the disease by exposing him to the substance which caused the disease.[3] The Board previously held in this case that because he experienced his last injurious exposure on March 18, 1997 while working for the respondent, claimant's notice and written claim were timely.[4] The Board adopts and reaffirms those findings as to notice and written claim but agrees with the ALJ that the greater weight of the credible evidence now supports a finding that claimant did not experience an "injurious exposure" at work and neither contracted nor permanently aggravated any condition or disease during his period of employment with respondent. Therefore, claimant is not entitled to benefits for an occupational disease under the Workers Compensation Act.

In general, occupational diseases are treated as injuries by accident under the Kansas Workers Compensation Act. K.S.A. 44-5a01(a) provides in part:

> Where the employer and employee or workman are subject by law or election to the provisions of the workmen's compensation act, the disablement or death of an employee or workman resulting from an occupational disease as defined in this section shall be treated as the

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[2] *See* K.A.R. 51-3-5.

[3] *See* Tomlinson v. Owens-Corning Fiberglas Corp., 244 Kan. 506, 770 P.2d 833 (1989).

[4] WCAB Order dated November 4, 1997.

> happening of an injury by accident, and the employee or workman or, in case of death, his dependents shall be entitled to compensation for such disablement or death resulting from an occupational disease, in accordance with the provisions of the workmen's compensation act as in cases of injuries by accident which are compensable thereunder, except as specifically provided otherwise for occupational diseases.

Further, K.S.A. 44-5a06 provides that the date when a worker becomes incapacitated from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease shall be utilized as the date of injury equivalent to the date of accident under the Workers Compensation Act. The same statute also provides that the last employer in whose employment the worker is last injuriously exposed to the hazards of the disease is liable to the worker for the occupational disease and does not have the right to seek contribution from other employers. Under some circumstances, however, the Act provides for an apportionment of liability between occupational and non-occupational factors.[5] Such an apportionment may or may not result in a reduction in disability benefits.[6]

In this case, the Board finds the opinion testimony of Dr. W. K. C. Morgan to be the most credible and persuasive. Dr. Morgan opined that claimant's emphysema and bronchitis conditions preexisted his employment with respondent. Dr. Morgan did not diagnose silicosis or interstitial fibrosis. Instead, he found claimant was suffering from chronic obstructive pulmonary disease (COPD), emphysema and bronchitis. Dr. Morgan noted that claimant's bronchitis symptoms failed to improve after he stopped working for the respondent, in fact they worsened. This worsening is inconsistent with the theory that it was the exposure to dust at the workplace that was causing or contributing to claimant's condition. Because claimant suffers from COPD and in particular emphysema, which Dr. Morgan determined were caused solely by the claimant's smoking and not by the inhalation of gypsum dust, it is clear that the claimant has not proven that he experienced an injurious exposure while working for the respondent. Workers compensation benefits, therefore, must be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated February 1, 2000, should be, and is hereby, modified to include the deposition of Dr. John Rudersdorf in the record, but is otherwise affirmed. Benefits are denied.

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[5] K.S.A. 44-5a01(d).

[6] *See* Burton v. Rockwell International, 266 Kan. 1, 967 P.2d 290 (1998).

The remaining orders of the Administrative Law Judge are hereby adopted by the Appeals Board and are incorporated herein by reference as if fully set forth to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Mark A. Buck, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director